



Neutral Citation Number: [2021] EWCA Civ 1442

Case No: B3/2020/1565

**IN THE COURT OF APPEAL (CIVIL DIVISION)**  
**ON APPEAL FROM THE HIGH COURT OF JUSTICE**  
**QUEEN'S BENCH DIVISION**  
**Mr Justice Martin Spencer**  
**2020 [EWHC] 2268 (QB)**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 07/10/2021

Before :

**LORD JUSTICE BEAN**  
**LADY JUSTICE ASPLIN**  
and  
**LORD JUSTICE NUGEE**

Between :

<b>Peter Griffiths</b>	<b><u>Respondent</u></b>
<b>- and -</b>	
<b>TUI (UK) Limited</b>	<b><u>Appellant</u></b>

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**Mr Howard Stevens QC, Mr Sebastian Clegg and Mr Dan Saxby** (instructed by **Kennedys Law LLP**) for the **Appellant**  
**Mr Robert Weir QC and Mr Stephen Cottrell** (instructed by **Irwin Mitchell LLP**) for the **Respondent**

Hearing date: 27<sup>th</sup> July 2021  
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**Approved Judgment**

***Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand down is deemed to be 11.00 a.m. on Thursday 7 October 2021.***

## **Lady Justice Asplin:**

1. This appeal raises the question of whether and if so, in what circumstances, the court can evaluate and reject what is described as an “uncontroverted” expert’s report. The question arises in the context of a claim in respect of gastric illness allegedly suffered as a result of consuming contaminated food or drink whilst staying at a hotel in Turkey on an all-inclusive package holiday provided by the Appellants, TUI (UK) Limited (“TUI”). The Respondent, Mr Peter Griffiths, suffered a serious gastric illness whilst on holiday in 2014, the symptoms of which persisted after his return home. He made a claim in contract and pursuant to the Package Travel, Package Holidays and Package Tours Regulations 1992.
2. By an order dated 5 September 2019, Her Honour Judge Truman dismissed Mr Griffiths’ claim and ordered him to pay TUI’s costs. She did so on the basis that she was not satisfied that the medical evidence showed that on the balance of probabilities Mr Griffiths’ illness was caused by contaminated food or drink supplied by the hotel. Martin Spencer J (the “Judge”) allowed Mr Griffiths’ appeal and set aside Judge Truman’s order. His judgment is to be found at [2020] EWHC 2268 (QB). This is a second appeal, therefore.

### *Factual background*

3. Mr Griffiths purchased the all-inclusive holiday from TUI for himself and his family for the period 2 August 2014 – 16 August 2014. At Birmingham Airport, he ate a burger purchased from a well-known burger chain. All other meals which he consumed were prepared and provided by the hotel in Turkey save for one which was eaten at a nearby town on 7 August 2014.
4. Mr Griffiths fell ill on the evening of 4 August 2014 suffering from stomach cramps and diarrhoea and spent the next two days in his room, by which time his symptoms had begun to lessen. On 7 August 2014, he went to a pharmacy in the local town to buy medication. Whilst he was there, he and his family went to a local restaurant. He said that he ordered a meal but could not eat much because he did not have much appetite.
5. On 10 August 2014, Mr Griffiths’ symptoms worsened. On 13 August 2014, he spoke to a doctor who advised him that he required hospital treatment. He was admitted to Kusadasi Hospital for three days and two nights where he was treated with intravenous fluids and antibiotics. The diagnosis was acute gastroenteritis. A stool sample was taken and analysed which showed multiple pathogens, both parasitic and viral.

### *The Claim*

6. Proceedings were issued and Particulars of Claim served on 19 July 2017. The claim was allocated to the multi-track. The matters relied on as to the cause of the illness included the food served at the hotel, dirty cutlery and crockery, the fact that the swimming pool appeared dirty and was inadequately cleaned, the fact that the public toilets near the swimming pool smelt offensive and that on at least one occasion, faecal contamination from a baby’s nappy was in evidence within the swimming pool. The pre-issue medical report obtained from Dr Linzi Thomas, a consultant gastroenterologist, and dated 14 July 2015, stated that on the balance of probabilities it was the poor hygiene standards within the hotel and a breakdown in general and food

hygiene processes such that the food, drink or fluids consumed at the hotel were the cause of the illness.

7. In the Defence, TUI denied that Mr Griffiths' illness had been caused by his consumption of food or drink at the hotel and put Mr Griffiths to proof as to when, where and under what circumstances he had fallen ill and as to the means by which any such illness was transmitted to him.
8. Thereafter, amongst other things: TUI was granted permission to obtain a report from a gastroenterologist and to serve a report from a Dr Gant, a consultant microbiologist, dealing with causation by 4pm on 15 August 2018; and Mr Griffiths was granted permission to rely upon the expert evidence served with the Particulars of Claim (the report from Dr Linzi Thomas), to obtain an updated report from Dr Thomas and to obtain and serve a report from a consultant microbiologist, a Professor Pennington, addressing causation.
9. TUI failed to serve a report from a gastroenterologist within the time specified, nor did it serve a report from its nominated microbiologist, Dr Gant. TUI having confirmed that it did not intend to rely upon expert evidence from a microbiologist, Professor Pennington's report was served, on behalf of Mr Griffiths. On 29 October 2018, TUI's application for permission to rely on a report from a gastroenterologist, and for relief from sanctions, was dismissed and as a result it was left without any expert evidence for the purposes of the trial.
10. At the trial before Judge Truman, the judge heard oral evidence from Mr Griffiths and his wife. Statements from Dr Ibrahim Kocaoglu, a medical doctor at the hotel in Turkey where Mr Griffiths and his family had stayed, and from Ms Kathy Nys, the Head of Guest Relations and Executive Assistant to the General Manager at the hotel, were also admitted in evidence.
11. Judge Truman accepted Mr Griffiths' evidence and that of his wife in full. As a result, she found that: Mr Griffiths had been ill as he had described; that he had eaten and drunk what he had described; and that he had fallen ill on the dates he had specified and had been hospitalised. The reports of Dr Thomas were relied upon solely for the purposes of proving Mr Griffiths' condition and prognosis. Professor Pennington's report was relied upon, together with his answers to questions put to him by TUI pursuant to CPR Part 35, in relation to causation. Professor Pennington was not required to be called or cross-examined, however. Accordingly, the only expert evidence in relation to causation which was before Judge Truman was Professor Pennington's report and his answers pursuant to CPR Part 35.

*Professor Pennington's report*

12. Professor Pennington's report, which is dated 23 July 2018, is short. The Judge described it as "minimalist" [11]. As one might expect, Professor Pennington set out his professional credentials, referred to the documents which he had used in preparing the report which included the Particulars of Claim, and set out his instructions, which included: "to confirm as to whether on the balance of probabilities the illnesses in question were caused as a result of staying at the hotel in question and a breakdown in the health and hygiene practices at the hotel". He also asserted that he had understood his duty as an expert witness and had complied with it and provided a statement of truth.

13. The body of the report comprises four numbered paragraphs of which three were substantive. As the nature of the content of the report is central to this appeal and whether, in the circumstances, it can be impugned as insufficient to prove causation, it is helpful to set out the substantive paragraphs in full:

“2. Peter Griffiths [Mr Griffiths] stayed at the . . . Hotel, Turkey, on an all-inclusive basis from 2 August – 16 August 2014. He fell ill on the night of 4 August with diarrhoea. His symptoms were severe for 48 hours. They eased but returned after seven days. He was admitted to hospital on 13 August. His blood pressure was high and he was dehydrated. He was discharged on 15 August. His stools were tested in the Turkish hospital, Ada Private Hospital. According to the discharge report of 16 August 2014 by Dr Yusuf Tuna, *Entamoeba histolytica* cysts and *Giardia intestinalis* was said to be seen on microscopy, and rotavirus, adenovirus, *E. histolytica* and *Giardia* antigen tests were positive. However, the Witness statement of Ibrahim Kocaoglu, the hotel doctor, the stool tests showed *Entamoeba histolytica* and *Giardia intestinalis* cysts, but the Rota, Adeno and Noro virus tests were negative. His statement says that Peter Griffiths was seen on 13 August 2014 with a history of 6 days sickness, abdominal cramps, and diarrhoea, which complaints started after dinner in Kusadasi town center on 6 August 2014. Self medication partially relieved the symptoms, but diarrhoea stated again on 11 August 2014.

3. I do not think that Peter Griffiths had amoebic dysentery caused by *Entamoeba histolytica*. *Entamoeba* cysts (which were found in his stools) are not diagnostic on their own because they cannot be distinguished routinely from the far commoner cysts of the harmless *Entamoeba dispar*. The onset of amoebic dysentery is usually gradual or intermittent; acute colitis is uncommon. Vomiting is not a feature and the diarrhoea is almost always bloody. Cases of amoebic dysentery most commonly have an incubation period of two to four weeks. None of these features lend support to a diagnosis of amoebic dysentery contracted in Turkey in Peter Griffiths’ case. I consider it to be statistically improbable that he had been infected simultaneously with *Giardia*, adenovirus and rotavirus. I note that a microscopic diagnosis of *Giardia* is not straightforward. However it is much more likely as a cause of gastroenteritis in this case than any of the other pathogens.

4. The possibility cannot be ruled out that Peter Griffiths had two infections, one starting on 4 August and a second starting on 11 August. It is not possible to make an accurate aetiological diagnosis in cases of gastroenteritis from symptoms alone. On the balance of probabilities the absence of vomiting as a symptom make a viral cause much less likely than a bacterial one. The commonest recorded bacterial causes of acute gastroenteritis in places like Turkey are *Campylobacter*, *Shigella* and *Salmonella*. *Giardia* is considered to be reasonably common. *Campylobacter* is more commonly recorded in travellers returning to the UK from holidays abroad than *Salmonella* or *Shigella*. Enterotoxigenic *E.coli* (ETEC) and its relatives are considered to be common causes of diarrhoea in countries such as Turkey. For technical reasons they are not

routinely tested for in the UK. The incubation period for Giardia ranges from one to fourteen days. It averages seven days. Peter Griffiths had been at the hotel for two days before he fell ill, and nine days before his diarrhoea returned. Campylobacter has an average incubation period of three days. For ETEC it ranges from 12 to 72 hours. On the balance of probabilities Peter Griffiths acquired his gastric illnesses following the consumption of contaminated food or fluid from the hotel.”

14. As I have already mentioned, TUI posed questions to Professor Pennington in relation to his report by way of clarification, pursuant to CPR Part 35. The Judge set out the relevant questions 4 – 8 and the answers which were given at [13] of his judgment. In his oral submission before us, Mr Stevens QC, on behalf of TUI, focused upon question 4 and the answer to it and upon question 10 and its answer. The judge recorded question 4 and its answer in the following way:

“4) You offer opinion that the claimant suffered gastric illness caused by consumption of contaminated food or fluid from the hotel. In relation to your opinion on causation, to what extent do you consider that there would be:

- a) A range of opinion on causation amongst appropriate experts?
- b) If there is a range, what is it?
- c) What is your position within that range?
- d) What facts and matters have you relied upon in adopting your position within that range?

Answer

a)-d) Regarding causation etc the appropriate experts would consider the gastroenteritis symptoms, their possible infective cause, the commonness of possible microbial causes in Turkey and their modes of transmission, their incubation periods and the length of time the claimant had been at the hotel. I did the same.”

Question 10 set out four sets of online guidance, three of which were in relation to giardia and giardiasis and the fourth of which concerned rotavirus, copies of which were attached. The Professor was asked: “Do you consider the content of the above publications to be reliable sources of information? If not, why not?” The Professor’s answer was that he did consider the publications to be reliable sources of information.

#### *Judge Truman’s judgment*

15. Judge Truman commented at [12] of her judgment that the fact that Mr Griffiths had been ill was not by itself sufficient for him to succeed in his claim. She said that he must satisfy the “test” in *Wood v TUI* [2018] QB 927, a case in which the claimants had

contracted gastroenteritis after consuming contaminated food and drink on an all-inclusive holiday. She quoted obiter dicta from the judgments of Burnett LJ (as he then was) and Sir Brian Leveson P in that case, as follows:

“ . . . In that case, Burnett LJ commented that:

“The judge was satisfied on the evidence that Mr and Mrs Wood suffered an illness as a result of contamination of the food or drink they had consumed. Such illness can be caused by any number of other factors. Poor personal hygiene is an example but equally bugs can be picked up in the sea or a swimming pool. In a claim for damages of this sort, the claimant must prove that food or drink provided was the cause of their troubles and the food was not “satisfactory”. It is well known that some people react adversely to new food or different water and develop upset stomachs. Neither would be unsatisfactory for the purposes of the 1982 Act. That is an acceptable hazard of travel. Proving that an episode of this sort was caused by food which was unfit is far from easy. It would not be enough to invite a court to draw an inference from the fact that someone was sick. Contamination must be proved; and it might be difficult to prove that food (or drink) was not of satisfactory quality in this sense in the absence of evidence of others who had consumed the food being similarly afflicted. Additionally other potential causes of the illness would have to be considered such as a vomiting virus. The evidence deployed in the trial below shows that the hotel was applying established standards of hygiene and monitoring of their food which were designed to minimise the chances that food was dangerous. The application of high standards in a given establishment, when capable of being demonstrated by evidence, would inevitably lead to some caution before attributing illness to contaminated food in the absence of clear evidence to the contrary.”

Sir Brian Leveson P commented:

“I agree that it will always be difficult (indeed very difficult) to prove that an illness is a consequence of food or drink which was not of satisfactory quality, unless there is cogent evidence that others have been similarly affected and alternative explanations would have to be excluded.””

16. With that in mind, she set out what she considered to be a number of deficiencies in Professor Pennington’s report at [18] – [21] of her judgment. In summary, they were:
- (i) the Professor having stated that the possibility of two separate infections could not be ruled out said nothing further about it and gave no explanation as to why the meal eaten on 7 August 2014 might not be at fault for the second episode, and why he concluded that Mr Griffiths acquired his illness following the consumption of contaminated food or fluid from the hotel [18];
  - (ii) the lack of reasoning to provide a link between the stated incubation periods for *Giardia*, (one to fourteen days with an average of seven), Mr Griffiths having fallen ill after two and then nine days after his arrival at the hotel and the conclusion that the illness was due to food or fluid at the hotel and the lack of any comment upon alleged breaches in the health and hygiene procedures [19];

(iii) having stated that a viral cause was much less likely than a bacterial one due to the fact that there was no vomiting, the Professor did not explain how it was that adenovirus and rotavirus were found in the samples and did not explain why they should be discounted. The judge went on: “The fact that viral infections more usually cause vomiting on the face of it means that sometimes you can have a viral infection without vomiting. Further, whilst a viral cause is apparently less likely than a bacterial one due to the lack of vomiting, I am not clear how this fits in with the fact that only parasites and viruses were isolated in the sample, not bacteria, and the pathogens that were found are known to cause stomach upsets.” [20];

and

(iv) the failure to address any of the non-food related methods of transmission for Mr Griffiths’ illness from the identified pathogens and the failure to state why they should be discounted in this case. [21].

17. Judge Truman also referred to Professor Pennington’s CPR Part 35 answers and noted, in particular, that no range of opinion was given, nor where his opinion might fall within such a range [22].
18. She went on to decide that Mr Griffiths had not proved his case and therefore, she dismissed his claim [30]. She pointed out that the burden of proof was on Mr Griffiths and that it was “open to a Defendant to sit back and do nothing save make submissions, and if the evidence is not sufficient to satisfy a court on the balance of probabilities, a claim will not succeed.” [28] She stated:

“... I am not satisfied that the medical evidence shows, ... that it is more likely than not that the Claimant’s illness was caused by ingesting contaminated food or drink supplied by the hotel. I accept Counsel for the Defendant’s submissions that a number of the assertions made are bare ipse dixit. There is sometimes a huge gap in reasoning between undoubted factual matters (such as incubation periods) and the conclusion that the hotel was at fault. The Court is not a rubber stamp to just accept what someone has said. When causation is clearly in issue, I do consider it incumbent on the medical experts to provide some reasoning for their conclusions. I consider that is what *Kennedy v Cordia* advises is required. I consider that it is necessary in this case to say why, at the least, it is considered that the pre-flight meal or the local town meal should be excluded. When both sets of pleadings raise a number of possible causes and transmission methods, it might also be thought that the expert report would set out why they would be considered less likely in this particular case. I consider that *Wood v TUI* has clearly said that the Court cannot just draw an inference from the fact that someone was ill, and that other potential causes have to be considered and excluded. Where the report does not mention a number of the raised other possible causes, I do not think it would be appropriate, without more, to assume that other causes have been considered and discounted for some good but unspecified reason.”

19. Judge Truman made clear that she considered that the reports of Dr Thomas and Professor Pennington did not satisfy the requirements specified in *Wood v TUI* and in

some instances, (the failure to provide a range of opinion), did not comply with CPR Part 35. She went on, also at [29] to add:

“ . . . [T]hey certainly do not provide me with sufficient information to be able to say that that (sic) there is a clear train of logic between, for example, the incubation periods and the onset of illness, so that the pre-flight meal can be excluded or that the hotel food is a more likely cause; similarly for the “second” illness – it is not said why it is more likely to be a relapse rather than a second infection, especially where the expert has said that it would be unlikely to have all the identified pathogens from one episode of eating contaminated food. It is thus not clear why the eating out in the local town can be discounted.”

20. Finally, she stated that had she not decided to dismiss the claim, the appropriate level of compensation would have been £29,000, the special damages claim would have been reduced to 25% to take account of the fact that it was gratuitous care, she would have awarded the medication costs claimed but not the past and future claim for yoghurt (the future cost of which was said to be over £11,000) and would have awarded £500 for the ruined holiday [35].

#### *The judgment on appeal*

21. On appeal, the central question was whether Judge Truman had erred in rejecting Professor Pennington’s expert evidence in the absence of any evidence challenging or contradicting his conclusion. The Judge characterised the appeal before him as raising a fundamental issue concerning the proper approach to expert evidence which is “uncontroverted”. He concluded that there are two questions to be answered: “first whether a court is obliged to accept an expert’s uncontroverted opinion even if that opinion can properly be characterised as bare *ipse dixit* and, if not, what are the circumstances in which a court is justified in rejecting such evidence; and, second, whether, in any event, Professor Pennington’s report could in fact properly be described as no more than bare *ipse dixit* entitling the learned judge to reject it despite being uncontroverted.” [2] and [31].
22. The judge elaborated on the concept of “uncontroverted” evidence at [10]. He described Professor Pennington’s report and his CPR Part 35 answers as being “uncontroverted in the sense that the Defendant [TUI] did not call any evidence to challenge or undermine the factual basis for Professor Pennington’s report, for example by calling witnesses of fact or putting in documentary evidence; nor was there any successful attempt by the Defendant [TUI] to undermine the factual basis for the report through cross-examination of the Claimant [Mr Griffiths] and his wife, nor by cross-examination of Professor Pennington.” He added: “In this sense, and unusually, the evidence of Professor Pennington was truly “uncontroverted”.”
23. The Judge decided that Judge Truman had not elevated the dicta in *Wood v TUI* to a special test but that all that she had been doing was to apply Burnett LJ’s dictum that, in a case of this kind, the claimant has the burden of proving that his illness was caused by eating food supplied by the hotel which was not fit for consumption, and that that is



a difficult test to satisfy when there are competing causes and cannot be satisfied simply by proof of the illness.

24. As a result, he endorsed the distinction between what had been styled the “quantitative” case where a claimant seeks to prove his claim that his illness was caused by contaminated food or drink by relying upon cogent evidence that numerous others had been similarly affected and alternative explanations had been excluded and the “qualitative” case, such as this one, in which the claimant seeks to prove his case by reliance upon samples and expert evidence.
25. In answering the first question which the Judge had posed for himself, he focused upon what he identified as an inconsistency or ambiguity in the judgment of Lords Reed and Hodge in *Kennedy v Cordia LLP* [2016] 1 WLR 597. He had relied upon that Supreme Court decision for his proposition that: “[I]n general, where an expert's opinion is disputed, that opinion will carry little weight if, on proper analysis, the opinion is little more than assertion on the part of the expert” [29]. He had also noted that Lords Reed and Hodge (with whom Baroness Hale and Lords Wilson and Toulson agreed) stated at [48] of their judgment that:

“48. An expert must explain the basis of his or her evidence when it is not personal observation or sensation; mere assertion or bare ipse dixit carries little weight, as the Lord President (Cooper) famously stated in *Davie v Magistrates of Edinburgh* 1953 SC 34, 40. If anything, the suggestion that an unsubstantiated ipse dixit carries little weight is understated; in our view such evidence is worthless. Wessels JA stated the matter well in the Supreme Court of South Africa (Appellate Division) in *Coopers (South Africa) (Pty) Ltd v Deutsche Gesellschaft für Schädlingsbekämpfung mbH* 1976 (3) SA352, 371:

“An expert's opinion represents his reasoned conclusion based on certain facts or data, which are either common cause, or established by his own evidence or that of some other competent witness. Except possibly where it is not controverted, an expert's bald statement of his opinion is not of any real assistance. Proper evaluation of the opinion can only be undertaken if the process of reasoning which led to the conclusion, including the premises from which the reasoning proceeds, are disclosed by the expert.””

And went on to note, also at [29] that:

“As Lord Prosser pithily stated in *Dingley v Chief Constable, Strathclyde Police* 1998 SC 548, 604: “As with judicial or other opinions, what carries weight is the reasoning, not the conclusion.””

26. The “internal inconsistency or ambiguity” was said to arise at [48] of the judgment of Lords Reed and Hodge when they state that on the one hand an unsubstantiated *ipse dixit* is worthless and on the other, they cite with approval, Wessels JA sitting in the Supreme Court of South Africa (Appellate Division) in the *Coopers (South Africa) (Pty) Ltd* case where Wessels JA said that an expert's bald statement of his opinion is not of any real assistance “except possibly where it is not controverted.” The Judge asked: “So, where it is not controverted, is it worthless or not?” [32].

27. He concluded that the answer is to be found in the judgment of Clarke LJ in *Coopers Payen Limited v Southampton Container Terminal Limited* [2004] Lloyds Rep 331 at [42] which is as follows:

“... the joint expert may be the only witness on a particular topic, as for instance where the facts on which he expresses an opinion are agreed. In such circumstances it is difficult to envisage a case in which it would be appropriate to decide this case on the basis that the expert’s opinion was wrong.”

The Judge went on at [32]:

“... If Mr Stevens’ test is correct, namely that, to be accepted, the expert report must be (a) complete, in the sense that it addresses all relevant issues which require to be considered, (b) sufficiently reasoned so that its conclusions can be understood, then it would be all too easy to envisage a case in which it would be appropriate to decide the case on the basis that the expert’s opinion was wrong. It seems to me that Clarke LJ must have had in mind a narrower test than this and I cannot think that, in so stating, Clarke LJ was assuming that the report would satisfy Mr Stevens’ test. Indeed, that test would mean the court rejecting Wessels JA’s proviso “except possibly where it is not controverted” in the case of a report which is a bare *ipse dixit*, despite the Supreme Court’s apparent approval of Wessel JA’s dictum.”

28. At [33] the Judge stated that in the absence of direct authority on the point, he took the view that “a court would always be entitled to reject a report, even where uncontroverted, which was, literally, a bare *ipse dixit*, for example if Professor Pennington had produced a one sentence report which simply stated: “In my opinion, on the balance of probabilities Peter Griffiths acquired his gastric illnesses following the consumption of contaminated food or fluid from the hotel.”” He went on to decide, however, that:

“... what the court is not entitled to do, where an expert report is uncontroverted, is subject the report to the same kind of analysis and critique as if it was evaluating a controverted or contested report, where it had to decide the weight of the report in order to decide whether it was to be preferred to other, controverting evidence such as an expert on the other side or competing factual evidence. Once a report is truly uncontroverted, that role of the court falls away. All the court needs to do is decide whether the report fulfils certain minimum standards which any expert report must satisfy if it is to be accepted at all.”

29. In addition, the Judge held that for an expert’s report to “pass the threshold for acceptance as evidence”, it must “substantially comply” with the Practice Direction to CPR Part 35 (“CPR PD 35”) and that Professor Pennington’s report did comply [35]. The Judge also noted that it was no part of CPR PD 35 that an expert, when setting out a summary of the conclusions he has reached, is also required to set out his reasons for those conclusions. He stated that in his judgment:

“36. . . a failure to set out the reasoning might diminish the weight to be attached to the report but, as I have stated, at this stage the weight to be attached to the report is not a consideration: that only arises once the report is controverted. It may be that, had the Defendant served controverting evidence, Professor Pennington would have expanded upon his reasoning, for example in a meeting of experts, and such reasoning would have found its way into a joint statement. As it turned out, that step never became necessary because the evidence of Professor Pennington stood alone. Nor did the Defendant seek to challenge the reasoning that might have lain behind Professor Pennington's conclusions by calling for him to be cross-examined, as it had every right to do. In those circumstances, the court must assume that there is some reasoning which lies behind the conclusion which has been reached and summarised, and that this reasoning is not challenged.”

30. The Judge concluded that the strong criticisms of Professor Pennington’s report went to the issue of the weight to ascribe to it which was an issue which would only have arisen if the report had been controverted and that: “[B]y ascribing, effectively nil weight to the report, the learned judge was ruling that the report did not meet the minimum requirements for it to be accepted as evidence in the case” and in that respect she was wrong [37].
31. Although it was not necessary for the Judge to answer the second question which he had posed for himself, he stated that despite the serious deficiencies in the Professor’s report it was not a bare *ipse dixit*. He accepted, however, that Professor Pennington did not set out his full reasoning, nor explain how he was able to reach his conclusion when he could not exclude the possibility of there having been two infections. Having referred once again to the Supreme Court in *Kennedy v Cordia*, the Judge noted that their Lordships referred to the opinion in that case being a bare or unsubstantiated one, thus amounting to an *ipse dixit*. He concluded that: “Professor Pennington went a long way towards substantiating his opinion by his consideration of the matters referred to above and his opinion was not a bare *ipse dixit* as it would have been had it been a single sentence . . . In fact, I doubt whether any report and opinion from an expert which substantially complies with the Practice Direction to CPR Part 35 could ever justifiably be characterised a mere *ipse dixit*.” [38]
32. Accordingly, the appeal was allowed and judgment was entered for Mr Griffiths.

#### *CPR PD 35*

33. Before turning to the grounds of appeal, it is helpful to have the relevant parts of CPR PD 35 in mind. They are as follows:

#### **“Form and Content of an Expert's Report**

. . .

3.2

An expert's report must—

- (1) give details of the expert's qualifications;
- (2) give details of any literature or other material which has been relied on in making the report;
- (3) contain a statement setting out the substance of all facts and instructions which are material to the opinions expressed in the report or upon which those opinions are based;
- (4) make clear which of the facts stated in the report are within the expert's own knowledge;
- (5) say who carried out any examination, measurement, test or experiment which the expert has used for the report, give the qualifications of that person, and say whether or not the test or experiment has been carried out under the expert's supervision;
- (6) where there is a range of opinion on the matters dealt with in the report—
  - (a) summarise the range of opinions; and
  - (b) give reasons for the expert's own opinion;
- (7) contain a summary of the conclusions reached;
- (8) if the expert is not able to give an opinion without qualification, state the qualification; and
- (9) contain a statement that the expert—
  - (a) understands their duty to the court, and has complied with that duty; and
  - (b) is aware of the requirements of Part 35, this practice direction and the Guidance for the Instruction of Experts in Civil Claims 2014.

...”

*The first ground of appeal*

34. Mr Stevens QC, on behalf of TUI, submits that the Judge erred in law in holding that where an expert's report is “uncontroverted”, the court is not entitled to evaluate the substance of the report and that all the court needs to do is to decide whether it fulfils the minimum standards prescribed by CPR PD 35. By “uncontroverted” he means that there is no factual evidence undermining the factual basis of the report, no competing expert evidence and no cross-examination of the expert takes place.

35. Mr Stevens says that if the Judge's approach is correct, if an expert states in his report that on the balance of probabilities a claimant's illness was the result of consuming contaminated food and it complies with the requirements of Practice Direction 35, that is enough. There is no need for the court to consider the expert's reasoning and it would be impermissible to do so even if the reasoning did not support the conclusion. All the court is required to do is to rubber-stamp compliance with the Practice Direction. To the contrary, Mr Stevens says that a judge is bound to consider whether he or she accepts the expert's reasoning and conclusions adduced in proof of a claim regardless of whether the report is controverted. If proof of the claim depends upon acceptance of that evidence, he says that the judge is bound to consider it in order to determine whether the claimant has discharged the burden of proof in relation to causation which is upon him.
36. He also submits that if the Judge is correct, the cost of low value claims will be increased and there will be a deleterious impact upon court resources. He says that defendants who do not call factual evidence with a view to undermining expert evidence, or where there is a risk that such evidence will not be accepted, will need to call expert evidence of their own and/or require the claimant's expert to attend for cross-examination, even if the claimant's expert evidence can be shown to be deficient. Mr Stevens asks: "If an expert's opinion is demonstrably deficient, or insufficient to prove what it is relied upon to prove, why should the claim be found proved merely because the evidence is that of an expert and is not controverted by other evidence or cross-examination?"
37. The basis of the submissions made by Mr Weir QC, on behalf of Mr Griffiths, is that if expert evidence is not contested by other evidence and there is no conflict for the court to resolve, the judicial function to weigh the evidence and resolve that conflict is not engaged and therefore, it is not permissible to look at the reasoning within the report, as long as it complies with CPR Part 35 and CPR PD 35 in particular. He submits that that was the position here and that the position is the same whether there is a single expert for a party or an expert who has been jointly instructed by the parties.
38. In summary, he also submits that: the distinction between the approach to uncontroverted and controverted expert evidence is clear from the authorities; uncontroverted evidence should not be weighed in the balance in the absence of exceptional circumstances and a good reason; that approach accords with fairness; the court can correct a mistake in an uncontroverted expert's report; a report which is merely a bare *ipse dixit* may be rejected depending on fairness to the parties and taking proportionality into account; and a report which does not comply substantially with CPR Part 35 may also be rejected.
39. He also submits that it is contrary to the overriding objective to allow an expert's report to remain unchallenged until closing submissions, which is what occurred in this case. He says that a defendant has to make his election. Either he adduces contrary evidence and/or uses the mechanisms under the CPR to challenge the report or he accepts it as it stands in the knowledge that the court will accept it. In this case, there was no contrary evidence, Professor Pennington was not called as a witness and he was not cross examined.

*Discussion and conclusions*

40. I should state at the outset, that in my judgment, the authorities do not support the bright line approach adopted by the Judge. There is no rule that an expert's report which is uncontroverted and which complies with CPR PD 35 cannot be impugned in submissions and ultimately rejected by the judge. It all depends upon all of the circumstances of the case, the nature of the report itself and the purpose for which it is being used in the claim. I should also add that none of the authorities to which we were referred were dealing with experts' reports which were inadequate in some way.
41. As I have already mentioned, the Judge founded his reasoning upon a perceived inconsistency or ambiguity at [48] of the judgments of Lords Reed and Hodge in *Kennedy v Cordia*. I have set out the passage from that case and the judge's reasoning in relation to it at [25] above. That case was one in which the pursuer who was a home carer slipped and fell on an icy path leading to a client's house and injured her wrist. She commenced a claim against the defenders on the grounds that their assessment of the risk of home carers falling on snow or ice had been inadequate, in breach of the Management of Health and Safety at Work Regulations 1999 and had breached their common law duty of care. The pursuer had adduced evidence from a consulting engineer with qualifications and experience in health and safety at work. The evidence was accepted by the Lord Ordinary but an Extra Division of the Inner House of the Court of Session allowed the defender's reclaiming motion, holding amongst other things that the evidence of the engineer had been impermissibly admitted and adopted. It was in this context that the Supreme Court considered the admissibility of the evidence of a "skilled witness" (in other words the evidence of an expert) and in which the dicta at [48] arose. See [38] – [56].
42. Having considered paragraph [48], I fail to see the ambiguity upon which the Judge's reasoning is based. If one reads that paragraph as a whole, it seems to me that their Lordships' intention was to make clear that unless the matter is one of personal observation, an expert must explain the basis for his or her conclusion. A mere assertion by an expert is of so little weight that it is likely to be worthless. It is in that light that they quote a passage from the judgment of Wessels JA in the *Coopers (South Africa) (Pty) Ltd* case which supports their conclusion that an expert's bald statement without the reasoning which leads to the conclusion is of little assistance to the court. Wessels JA makes clear that proper evaluation of the opinion can only take place if the process of reasoning which leads to the conclusion is set out. It seems to me, therefore, that in quoting Wessels JA, their Lordships were not endorsing his aside in relation to uncontroverted expert evidence and in any event, that aside is expressed only in terms of a possibility.
43. It follows that once *Kennedy v Cordia* is read in that light, there is no ambiguity which needs to be resolved. It is unnecessary, therefore, to look for a solution as the Judge did. In any event, it also seems to me that the passage in the judgment of Clarke LJ in the *Coopers Payen* case, upon which the Judge relied, does not provide a basis for the Judge's conclusion.
44. *Coopers Payen* was a case in which the question for the judge was ultimately whether a large piece of machinery which had arrived as cargo on a ship and was being moved had toppled over because of a breach of duty by the defendant, Southampton Container Terminal Limited. Clarke LJ who gave the leading judgment, with whom Schiemann LJ and Lightman J concurred, stated that the question "had to be considered by reference to the evidence as a whole, including the eyewitness evidence and the expert

evidence, all of which (like any evidence) must be considered against the probabilities” [38]. It was submitted that the judge had rejected the evidence of the joint expert in circumstances in which she should not have done so, given that he was a joint expert [39]. The expert was examined in chief by the judge and cross examined by both counsel. Amongst other things, on one of the issues, the judge preferred the evidence of an eyewitness to that of the expert.

45. Clarke LJ addressed the matter of principle, in the following way:

“40. Mr Russell submits that it should be the rare case indeed in which it is appropriate for the Court to disregard the evidence of a single joint expert, and such a case will be limited to circumstances where the witness has failed to comply with his over-riding duty to the court or has plainly erred. He further submits that where such evidence is disregarded the Judge must give clear and cogent reasons for doing so. There is force in those submissions.

41. Mr Buckingham by contrast, summarized his relevant submissions in this regard as follows:

- “i. Generally the expert's report will be his evidence, without the need for amplification or cross-examination.
- ii. However, in some circumstances it will be appropriate for the parties to have the opportunity to cross-examine the expert; for instance, as in this case, where the report was produced very late and the expert has not considered all the written questions that had been put to him.
- iii. The report and the expert's oral evidence, if applicable, is then the evidence of the expert.
- iv. This evidence must then be weighed in the balance with the other evidence in the case and the judge will come to a conclusion based upon all the evidence.
- v. The principles set out by Lord Woolf in *Peet v Mid-Kent Healthcare Trust* are directed at the first three of those points. The case does not establish that the evidence of the expert must then be accepted by the court. The court must take its own view of the expert evidence in the light of all the other evidence.

I would accept those submissions, as I think Mr Russell did, in the course of his oral argument. I would add these further observations.

42. All depends upon the circumstances of the particular case. For example, the joint expert may be the only witness on a particular topic, as for instance where the facts on which he expresses an opinion are agreed. In such circumstances it is difficult to envisage a case in which it would be appropriate to decide this case on the basis that the expert's opinion was wrong. More often, however, the expert's opinion will be only part of the evidence in the case. For example, the assumptions upon which the expert gave his opinion may prove to be incorrect by the time the judge has heard all the evidence of fact. In that event the opinion of the expert may no longer be relevant, although it is to be hoped that all relevant assumptions

of fact will be put to the expert because the court will or may otherwise be left without expert evidence on what may be a significant question in the case. However, at the end of the trial the duty of the court is to apply the burden of proof and to find the facts having regard to all the evidence in the case, which will or may include both evidence of fact and evidence of opinion which may interrelate.”

46. I agree with Mr Stevens that when stating that where a joint expert is the only witness on a topic and the facts on which he expresses his opinion are agreed, it is difficult to envisage a case in which it would be appropriate to decide the case on the basis that the expert's opinion was wrong, Clarke LJ was not addressing the situation which faced Judge Truman here. There is no suggestion that he had in mind an expert's report which was a bare *ipse dixit*, nor was he considering the situation in which the expert's report did not deal with all the relevant issues, the expert's conclusion was unsubstantiated by the reasoning or the reasoning was inadequate or incomplete. It cannot be assumed, therefore, that Clarke LJ's dicta were intended to cover an expert's report of that kind. It seems to me, therefore, that his conclusions do not take this matter much further forward and cannot operate as a springboard for the Judge's conclusions.
47. The same is true of the passage in the judgment of Lightman J in that case, at [67] to which Mr Weir referred us. Lightman J stated as follows:

“Where a single expert gives evidence on an issue of fact on which no direct evidence is called, for example as to valuation, then subject to the need to evaluate his evidence in the light of his answers in cross-examination his evidence is likely to prove compelling. Only in exceptional circumstances may the Judge depart from it and then for a good reason which he must fully explain. . . .”
48. It is also important to note that at the end of the same paragraph, to which I have referred, Clarke LJ stated that at the end of the trial it is the duty of the court to apply the burden of proof and to find the facts having regard to all the evidence in the case which may include both evidence of fact and evidence of opinion which may interrelate. Such a proposition is hardly controversial. It seems to me that he was considering the exercise of the normal judicial function, in relation to all of the evidence before a judge.
49. In my judgment, for all the reasons I have mentioned, therefore, this passage in Clarke LJ's judgment provides no support for the contention that in all circumstances, the court is bound to accept uncontroverted expert evidence which complies with CPR PD 35.
50. I should add that, in principle, I do not dissent from Clarke LJ's conclusions. If the report of a joint expert covers the relevant issues and the conclusion is supported by logical reasoning and it is the only evidence on the topic, it is difficult to envisage a situation in which it would be appropriate to decide that it is wrong. That does not mean that such circumstances may not exist. After all, both sides will have instructed the expert. As Clarke LJ pointed out, it all depends on the circumstances.
51. In any event, in my judgment, Judge Truman did not decide that Professor Pennington's report was “wrong” in the sense of expressly rejecting his conclusion. She decided that



the report was insufficient to satisfy the burden of proof in relation to causation which fell upon Mr Griffiths because of its deficiencies, which she set out.

52. We were also referred to a number of criminal cases which were concerned with the treatment of expert evidence by a jury in support of the contention that uncontroverted expert evidence does not engage the judicial function. I have to say that I did not find them of great assistance. They raise different considerations and are focused on the role of the jury in a criminal trial. Some analogies can be drawn, however, and I will consider them briefly.
53. The first criminal case in time was *R v Matheson* [1958] 1 WLR 474 and the second was *R v Byrne* [1960] 2 QB 396. They were both murder cases in which a defence of diminished responsibility was raised. In *R v Matheson* the jury rejected the unchallenged evidence of three doctors to the effect that the defendant was suffering from an abnormality of mind so as to substantially impair his mental responsibility. They had been cross-examined but their opinions were not challenged, nor were the facts disputed. Lord Goddard CJ gave the judgment of the Court of Appeal, Criminal Division. It was held that the verdict was unsupported by evidence and must be set aside. Lord Goddard stated at 478 that “if the doctors’ evidence is unchallenged and there is no other on this issue, a verdict contrary to their opinion would not be “a true verdict in accordance with their evidence”.
54. In *R v Byrne*, Lord Parker CJ stated at 403 that medical evidence was of importance to the question of whether the defendant was suffering from an abnormality of mind, but that the jury was entitled to take into account all the evidence and were not bound to accept the expert medical evidence “if there is other material before them which, in their good judgment, conflicts with it and outweighs it”.
55. Both authorities were quoted and considered in the third case which was *R v Brennan* [2015] 1 WLR 2060. In that case the Court of Appeal, Criminal Division held that where a defendant charged with murder relied upon the defence of diminished responsibility which was supported by uncontradicted expert evidence, the trial judge should withdraw the charge of murder from the jury at the close of the evidence, notwithstanding that the defence was contested by the Crown, if in his considered view, on the evidence as a whole, no properly directed jury could properly have convicted of murder.
56. Davis LJ handed down the judgment of the court. He noted that there were two potentially conflicting principles, the first being that criminal trials are decided by juries and not experts who decide the case on the entirety of the evidence and the second being that juries must base their conclusions on the evidence ([43]). He went on:

“44. There can, as we see it, be no room for departure from so fundamental a principle as the second principle. It reflects the very essence of the jury system and of a just and fair trial. But the first principle, whilst most important and undoubtedly descriptive of the general position, is also capable, as it seems to us, of admitting of degree of qualification in a suitably exceptional case. Clearly no difficulty arises (normally) where there is a dispute as to the expert evidence. The jury decides. But suppose, for example, a matter arises falling exclusively within the domain of scientific expertise; suppose, too, that all the well-qualified experts

instructed on that particular matter are agreed as to the correct conclusion and no challenge is made to such conclusion. Can it really be said that the jury nevertheless can properly depart from the experts on that particular matter, simply on the basis that it is to be said, by way of mantra, that the ultimate conclusion is always for the jury? We would suggest not. Where there simply is no rational or proper basis for departing from uncontradicted and unchallenged expert evidence then juries may not do so.

45. In the Bench Book previously issued by the Judicial Studies Board, the specimen direction then published with regard to expert evidence suggested, among other things, that juries were not bound to accept an expert witness's opinion – of itself, a correct and wholly unexceptional proposition – and were free to reject it: even if it was agreed or unchallenged evidence. This latter part may be queried; at all events as an unqualified general proposition. In our view, the position is more accurately stated in the standard directions in the Crown Court Bench Book subsequently issued by the Judicial Studies Board in 2010 (the Judicial Studies Board *Crown Court Bench Book: Directing the Jury* (March 2010)). That suggests a direction of this kind (after the usual directions and appropriate stress on the need for a jury to consider all the evidence) where the expert evidence on a particular topic is agreed: “Where, as here, there is no dispute about findings made by an expert you would no doubt wish to give effect to them, although you are not bound to do so if you see good reason to reject them.” In our view, if we may respectfully say so, that is altogether a more acceptable approach. It is the more acceptable because it acknowledges that if unchallenged expert evidence on a particular point calling for such expertise is to be rejected by a jury then it must be rejected for *reason*.”

57. It seems to me that neither Davis LJ's conclusions, nor those of Lord Goddard, are controversial or surprising. The jury must decide a case upon all the evidence in just the same way as a judge in a civil trial. Furthermore, where there is expert evidence which is within the domain of scientific expertise and no challenge is made to it, and there is no rational or proper basis for departing from it, the jury may not do so. In the same way, it is hard to envisage the circumstances in which it would be appropriate for a judge to do so. However, that does not mean that there is a strict rule that uncontroverted evidence must be accepted at face value whatever it says. As Davis LJ noted at [45] of his judgment, the then most recent Crown Court Bench Book stated that where there was no dispute about the findings of an expert, the jury is likely to wish to give effect to them but was not bound to do so if there was good reason to reject them. As Davis LJ stated, this is consistent with the principle that if unchallenged expert evidence is to be rejected then it must be rejected for a reason.
58. Rather than support the contention that there is a bright line between controverted and uncontroverted expert evidence, it seems to me that Davis LJ's judgment supports a more nuanced approach. Even in a criminal trial, the jury may reject uncontroverted expert evidence where there is reason to do so. That approach is consistent with the dictum of Hickinbottom LJ in the civil context in *Whiting v First/Keolis Transpennine Ltd* [2018] EWCA Civ 4 at [34] where he stated as follows:

“Whilst, as Stuart-Smith LJ said in *Liddell v Middleton* [1996] PIQR P36 at page P43, “We do not have trial by expert in this country; we have trial by judge”, where experts are agreed on a matter within their technical expertise, a judge will only rarely reject that evidence; and should not do so without applying considerable caution and giving adequate reasons. . . ”

That was a case which was concerned with the treatment of agreed expert evidence relating to an accident on the railway.

59. Once again, it seems to me that none of these propositions supports the Judge’s conclusion. Furthermore, none of the authorities to which we have been referred have been concerned with the issue which arose here. There is no suggestion that any of the experts’ reports under consideration were deficient in any way.
60. What of fairness? Mr Weir submitted that it is unfair only to challenge an expert’s evidence in closing submissions. He says that if a party intends to criticize an expert’s reasoning, they must avail themselves of all the means available under the CPR and that they must either put in contrary evidence and/or put the points to the expert in cross-examination. Furthermore, he says that in this case, TUI could have sought permission to put further questions to Professor Pennington pursuant to CPR Part 35. He says that a party cannot sidestep those procedures, and in particular, sidestep cross examination in order to avoid answers they do not want to hear.
61. He relied in this regard upon *Browne v Dunn* (1893) 6 R 67 HL, *Markem Corpn v Zipher Ltd* [2005] RPC 31 and *Chen v Ng* [2017] UKPC 27. In *Browne v Dunn*, Lord Herschell LC remarked at 70:

“Now, my Lords, I cannot help saying that it seems to me to be absolutely essential to the proper conduct of a cause, where it is intended to suggest that a witness is not speaking the truth on a particular point, to direct his attention to the fact by some questions put in cross-examination showing that that imputation is intended to be made, and not to take his evidence and pass it by as a matter altogether unchallenged, and then, when it is impossible for him to explain, as perhaps he might have been able to do if such questions had been put to him, the circumstances which it is suggested indicate that the story he tells ought not to be believed, to argue that he is a witness unworthy of credit. My Lords, I have always understood that if you intend to impeach a witness you are bound, whilst he is in the box, to give him an opportunity of making any explanation which is open to him; and, as it seems to me, that is not only a rule of professional practice in the conduct of a case, but is essential to fair play and fair dealing with witnesses. Sometimes reflections have been made upon excessive cross-examination of witnesses, and it has been complained of as undue; but it seems me that a cross-examination of a witness which errs in the direction of excess may be far more fair to him than to leave him without cross-examination, and afterwards to suggest that he is not a witness of truth, I mean upon a point on which it is not otherwise perfectly clear that he has had full notice beforehand that there is an intention to impeach the credibility of the story which he is telling. Of course I do not deny for a moment that there are cases in which that notice has been so distinctly and

unmistakably given, and the point upon which he is impeached, and is to be impeached, is so manifest, that it is not necessary to waste time in putting questions to him upon it. All I am saying is that it will not do to impeach the credibility of a witness upon a matter on which he has not had any opportunity of giving an explanation by reason of there having been no suggestion whatever in the course of the case that his story is not accepted.”

62. In my judgment, neither *Browne* nor the subsequent cases which reiterate the same principle are relevant here. They are concerned with the circumstances in which a significant aspect of the evidence of a witness is challenged on the basis that it is untrue. If the credibility of a witness is to be impeached as a matter of fairness, he should be given the opportunity of giving an explanation. If he has not been given the opportunity, in the absence of further relevant facts, generally it is not appropriate to challenge the evidence in closing speeches.
63. Lords Neuberger and Mance, sitting in the Privy Council in *Chen*, decided however, that the “decision whether to uphold a trial judge’s decision to reject a witness’s evidence on grounds which were not put to the witness must depend on the facts of the particular case. Ultimately, it must turn on the question whether the trial, viewed overall, was fair bearing in mind that the relevant issue was decided on the basis that a witness was disbelieved on grounds which were not put to him.” [54]
64. There is no question here of the Professor being disbelieved. His credibility was not in issue. It seems to me, therefore, that this line of cases is of no assistance.
65. Furthermore, I can see nothing which is inherently unfair in seeking to challenge expert evidence in closing submissions. It may be a high risk strategy to choose neither to adduce contrary evidence nor to seek to cross-examine the expert but there is nothing impermissible about it. The fact that TUI decided not to call their own microbiologist having been given permission to do so and failed to serve the report from their gastroenterologist in time or to obtain relief from sanctions, does not alter that. As long as the expert’s veracity is not challenged, a party may reserve its criticisms of a report until closing submissions if it chooses to do so. The defendant is entitled to submit that the case or an essential aspect of it has not been proved to the requisite standard. He cannot be prevented from doing so because some of the evidence is contained in an uncontroverted expert’s report. Furthermore, he cannot be required to file his own contrary expert’s evidence in order to enable the court to weigh the evidence. The judge cannot be prevented from considering the quality of such evidence in order to determine whether the burden of proof is satisfied just because it is uncontroverted. As Judge Truman stated, the court is not a rubber stamp. If it were otherwise, the court would be bound by an uncontroverted expert’s report which satisfied CPR PD 35, even if the conclusion was only supported by nonsense.
66. Furthermore, the expert and the party for whom he or she has been called are not entitled to require the opposing party to give them an opportunity to make good deficiencies in their evidence by seeking permission to pose further questions or by cross-examining the expert witness whose report contains lacunae in the subject matter considered or in the reasoning. That is the effect of Mr Weir’s submissions. It is for the party who files the evidence in support of his case to make sure that all relevant matters are covered

and that the content of the report is sufficient to satisfy the burden of proof on the issue to which it is directed.

67. In this case, the closing submissions were to the effect that the Professor's report was insufficient to enable Mr Griffiths to prove on the balance of probabilities that his illness had been caused by contaminated food or drink at the hotel. As I have already mentioned, it was not being suggested that the Professor's report was necessarily wrong in any way - just that it did not enable Mr Griffiths to satisfy the burden of proof as to causation. As part of a fair trial, it seems to me that it was essential that Judge Truman engaged with those submissions and determined whether causation had been proved to the requisite standard. She did so quite rightly and determined that question on the evidence before her. She had cogent reasons for deciding that the burden of proof in relation to causation had not been satisfied and rejected Professor Pennington's report accordingly. Her reasoning was set out at [18] – [22] of her judgment. She did not decide that the Professor was wrong, just that his report was insufficient to satisfy the burden in relation to causation. It is not for us, nor was it for the Judge to overturn her evaluative judgment in that regard.
68. The position here is obviously different from that in *Woolley v Essex County Council* [2006] EWCA Civ 753. However, that case supports the conclusion that it is for the court to analyse an expert's report rather than to accept it at face value. In that case, Hallett LJ (with whom Dyson and Pill LJ concurred) held that it was incumbent on a judge to analyse an expert's report and decide for himself whether the expert had inadvertently referred to the wrong figures. In the face of what Hallett LJ described in that case as "lack of clarity and arguably glaring inconsistency" it was not for the judge to assume that the expert had got it right. [38]
69. It will be clear from everything that has gone before that I do not consider that there is a strict rule that prevents the court from considering the content of an expert's report which is CPR PD 35 compliant, where it has not been challenged by way of contrary evidence and where there is no cross-examination. The approach to such evidence all depends on the circumstances. As I have already mentioned, where the evidence is that of a joint expert, which goes to the relevant issues and contains logical conclusions, it is very hard to see that it could be successfully challenged. The same must be true if there are two experts who have produced coherent reports covering the relevant issues and who are agreed. As the authorities provide, it will be rare that expert evidence should be rejected in those circumstances and cogent reasons should be given.
70. I reiterate, however, that everything depends upon the circumstances. As the Judge stated at [33] of his judgment a court may reject a report, even where it is uncontroverted, if it is a bare *ipse dixit*. In most circumstances, it is likely that such a report would not meet the requirements set out in CPR Part 35, in any event. However, if the opinion is contained in only a few sentences, there might be circumstances in which such evidence could be accepted. For example, if the sentences contained an opinion as to whether a certain chemical was present in a compound. Where the expert evidence is the form of an evaluative opinion, as the Supreme Court pointed out in *Kennedy v Cordia*, a mere *ipse dixit* is all but worthless, however.
71. It also follows that although CPR PD 35 does not state expressly that reasons are necessary in an expert's report, save where there is a range of opinion, it seems to me that it is clear both from the judgments in *Kennedy v Cordia* and as a matter of common

sense, that if the court is to be satisfied as to the conclusion reached, or in a case like this, that the evidence is sufficient to enable the claimant to satisfy the burden of proof in relation to causation, some chain of reasoning supporting the conclusion is necessary, even if it is short. In this case, it would not have taken much to make good the deficiencies which Judge Truman identified. If, for example, Professor Pennington had answered question 4 of the CPR Part 35 questions by adding just a few sentences explaining the range of opinions as to sources and causes of infection, the question of whether there were one or two infections, the significance of the meals eaten outside the hotel and where Professor Pennington's opinion stood within that range or those ranges, the burden of proof may have been satisfied.

*The remaining grounds of appeal*

72. In the light of my reasoning in relation to the first ground of appeal, it is not strictly necessary to consider the remaining grounds. However, I will set out my conclusions, albeit briefly.
73. The second ground is that the Judge erred in law in holding that Professor Pennington's report met the minimum standard required by CPR PD 35 because contrary to the Judge's finding the Professor did not provide a range of opinion in response to question 4. In this regard, it will be apparent from what I have already said that I disagree with the Judge's conclusion at [35(x)] of his judgment. It seems to me that the Professor's answer to question 4 was no answer at all. He merely set out a statement of the approach which experts would take and stated that he did the same. It does not follow that all experts would reach the same conclusion as the Professor or where his opinion fell within the range.
74. Given that *Giardia* and two different viruses were found in Mr Griffiths' samples, the Professor himself raised the question of whether Mr Griffiths might have suffered two illnesses rather than one (but did not elaborate upon that issue at all), issues arose in relation to the incubation period for *Giardia* and Mr Griffiths had consumed food outside the hotel, there was obviously scope for a range of opinion. This was all the more so, in the light of the Professor's acceptance of the various publications as reliable sources in his answer to question 10. They raised the possibility of causes of Mr Griffiths' illness other than food and drink which the Professor did not address but in relation to which there would also have been a range of opinion.
75. In the light of those deficiencies, it seems to me that it is no answer to say, as the Judge did, that TUI could have made an application to the court for an order requiring the Professor to provide an answer to question 4. It was incumbent upon the Professor to answer the question and his failure to do so created an important deficiency in his evidence.
76. The third ground of appeal is concerned with whether an expert is required to provide reasoning for his conclusion. The Judge held at [36] that the law does not require it. Although it is true that reasoning is only referred to under CPR PD 35 para 3.2(6)(b) where there is a range of opinion, it is apparent from what I have already said and from the dicta of Lords Hodge and Reed in *Kennedy v Cordia* that in most cases, some reasoning is necessary in order to support an expert's conclusion. Otherwise, it is all but worthless. Such a conclusion is mere common sense. If the expert is to fulfil his overriding duty to assist the court, it is inevitable that a report must contain a basis for

the expert's conclusions. This is reflected in paragraph 62 of the Civil Justice Council "Guidance for the instruction of experts in civil claims" (2014) which, amongst other things, provides that the summary should be at the end of a report "after the reasoning" and that the judge may be "assisted in the comprehension of the facts and analysis if the report explains at the outset the basis of the reasoning". Obviously, the extent of the reasoning required will depend upon what is necessary in the circumstances.

77. The fourth ground of appeal challenges what is described as a rigid test said to have been adopted by the Judge under which uncontroverted expert evidence must be accepted if it meets the minimum standards established by CPR PD 35. It will be apparent from everything which I have already said that I consider that a rigid test based solely upon whether the requirements of CPR PD 35 have been met is inappropriate. A failure to meet those requirements is obviously relevant to the court's approach to an expert's report. However, compliance with CPR PD 35 alone is insufficient to require the court to accept uncontroverted expert evidence. It all depends on the circumstances. There is no rigid test.
78. Lastly, as I have already mentioned, I consider that Judge Truman was entitled to conclude that Professor Pennington's evidence was insufficient to satisfy the burden of proof on Mr Griffiths in relation to causation for the cogent reasons she gave. It is not for this court to interfere, nor was the Judge right to do so. Accordingly, if the Judge's statement at [38] of his judgment that the Professor "went a long way towards substantiating his opinion" should be understood as meaning that the burden of proof was satisfied, it seems to me that the Judge was wrong to have disagreed with Judge Truman in the way he did.
79. For all of the reasons set out above, I would allow the appeal.

**Lord Justice Nugee:**

80. I am grateful to Asplin LJ for her careful analysis of the authorities, and I entirely agree with her clear and compelling conclusions. I add a very few words of my own to summarise what I see as the points of principle.
81. As a matter of basic principle it is the function of trial judges to evaluate all the evidence before them in reaching their conclusions on the factual issues. That includes deciding what weight should be given to the evidence. I see nothing in the authorities that suggests that that obligation to assess the evidence falls away if it is "uncontroverted"; uncontroverted evidence still has to be assessed to see what assistance can be derived from it, viewed in the context of the circumstances of the case as a whole. Uncontroverted evidence may be compelling, but it may not be: it may be inherently weak or unhelpful or of little weight for other reasons.
82. Mr Weir in the course of argument accepted that that might be so with witnesses of fact, but submitted the position was different with experts. But I do not detect in the authorities any special rule for expert evidence. What one does find are eminently sensible statements, for example that by Clarke LJ in *Coopers Payen* that if a joint expert's evidence is the only evidence on an issue, it is difficult to envisage the Court concluding that the expert's evidence was wrong; or that by Davis LJ in *R v Brennan* that where expert evidence is agreed, juries should not depart from it without good reason. Neither, as Asplin LJ points out, was expressly dealing with a case where a

trial judge is faced with submissions that an expert's report does not adequately explain the reasons for his conclusion, and I very much doubt if either thought that what they were saying amounted to a special rule entitling, let alone obliging, trial judges (or juries) to abandon their role of assessing the evidence to see what weight to give to it and to consider whether it proved what needed to be proved.

83. On that issue the guidance from the Supreme Court in *Kennedy v Cordia* is clear: an unsubstantiated assertion by an expert is “worthless”, because what carries weight is the reasoning not the conclusion. As Jacob J put it in *Routestone Ltd v Minorities Finance Ltd* [1997] BCC 180 (cited by Lewison LJ in *Kingley Developments Ltd v Brudenell* [2016] EWCA Civ 980 at [30]):

“What really matters in most cases is the reasons given for the opinion. As a practical matter a well-constructed expert's report containing opinion evidence sets out the opinion and the reasons for it. If the reasons stand up the opinion does, if not, not.”

84. It follows in my judgment that even though TUI had neither called any expert evidence of its own, nor required Professor Pennington to attend for cross-examination, counsel for TUI was not precluded from making submissions as to the inadequacy of the reasoning in his report, and Judge Truman was not only entitled but right to examine that reasoning to see what weight to ascribe to his opinion, and whether the case had been proved. I see nothing wrong in what she did, and do not consider that the Judge was right to disturb her conclusion in the way that he did.
85. In those circumstances I agree that the appeal should be allowed.

**Lord Justice Bean:**

86. As Judge Truman observed at paragraph [28] of her judgment, “it is trite law that the burden of proof is on the Claimant. It is open to a Defendant to sit back and do nothing save make submissions, and if the evidence is not sufficient to satisfy a court on the balance of probabilities, a Claimant will not succeed”.
87. But it is even more trite law that, as *Phipson on Evidence* puts it:

“In general, a party is required to challenge in cross-examination the evidence of any witness of the opposing party if he wishes to submit to the court that the evidence should not be accepted on that point. The rule applies in civil cases as it does in criminal. In general the CPR does not alter that position. This rule serves the important function of giving the witness the opportunity of explaining any contradiction or alleged problem with his evidence. If a party has decided not to cross-examine on a particular important point, he will be in difficulty in submitting that the evidence should be rejected.” (19<sup>th</sup> edn, 2018, para.12-12).



Throughout my 28 years as a practising barrister this proposition would have been regarded as so obvious as not to require the citation of authority. Certainly we were not shown any authority to the contrary. And I agree with Nugee LJ that there is no special rule for experts.

88. As Asplin LJ has set out, an order was made in this case in the usual way giving each party permission to rely on expert evidence from one microbiologist and one gastroenterologist. The order made provision for the relevant experts to meet and agree a joint statement setting out the areas of their agreement and disagreement. Martin Spencer J said at paragraph [36] of his judgment:-

“It may be that, had the Defendant served controverting evidence, Professor Pennington would have expanded upon his reasoning, for example in a meeting of experts, and such reasoning would have found its way into a joint statement. As it turned out, that step never became necessary because the evidence of Professor Pennington stood alone. Nor did the Defendant seek to challenge the reasoning that might have lain behind Professor Pennington’s conclusions by calling for him to be cross-examined, as it had every right to do. In those circumstances, the court must assume that there is some reasoning which lies behind the conclusion which has been reached and summarised, and that this reasoning is not challenged.”

89. This was a multi-track trial where there was no requirement (as there is on the fast track and the small claims track: CPR 35.5 for a special order that experts should give evidence orally. The default position, therefore, was that witnesses would have to attend for cross-examination if requested to do so. If Professor Pennington had for whatever reason been unavailable to attend for cross-examination, or had attended for cross-examination and added nothing to the reasoning in his report despite being challenged on his conclusions, then I would agree that Judge Truman would have been entitled to dismiss the claim for the reasons given by Asplin and Nugee LJJ. However, that is not what happened in this case.
90. I do not accept that the principle set out in *Phipson* is confined to cases such as *Browne v Dunn*, in which it was held that a witness must be challenged in cross-examination if it is sought to allege that the witness is lying. The principle is wider than that, and applies both to lay witnesses and experts. It does not extend to every point of detail in a long witness statement: that is a matter for the discretion and common sense of the trial judge. But here Professor Pennington gave a clear conclusion on the very issue on which he was asked to give an opinion, namely that “on the balance of probabilities Peter Griffiths acquired his gastric illnesses following the consumption of contaminated food or fluid from the hotel”. This could and should have been challenged in cross-examination.
91. I agree with Asplin LJ that the criminal cases are not of much assistance. This is for several reasons. Firstly, it is now wholly unacceptable for judges to direct juries to convict: it is therefore conventional in the ordinary case where the prosecution must prove their case beyond reasonable doubt, and the only expert evidence is firmly in favour of the prosecution, to tell the jury that we have trial by jury and not trial by

expert. The same direction is often given on an issue such as diminished responsibility where the defence bear the burden of proof, but this is subject to the duty of the judge, as held in *R v Brennan*, to withdraw the issue from the jury if there is no rational or proper basis for rejecting a matter within the domain of scientific expertise upon which the experts are agreed and on which they have not been challenged.

92. Secondly, the prosecution is under a duty to disclose evidence (including expert evidence) in its possession which might undermine the Crown's case or assist the defence; defendants in civil cases, and their insurers, are under no such duty.
93. Thirdly, even on an issue where the burden of proof is on the defence, it is inconceivable that a criminal trial judge would allow the prosecution to make closing submissions to the jury that the reasoning of a defence expert was defective unless the relevant points had been fairly and squarely put to the expert in the witness box.
94. I think that Martin Spencer J was wrong to hold that a judge is effectively bound to accept the evidence of an expert if it is not controverted by other expert or factual evidence; and that "once a report is truly uncontroverted, the role of the court falls away". As the Supreme Court said in *Kennedy v Cordia Services LLP* [2016] 1 WLR 597, "expert assistance does not extend to supplanting the court as the decision-maker. The fact-finding judge cannot delegate the decision-making role to the expert." But I do consider that a judge is generally bound to accept the evidence of an expert if it is not controverted by other expert or factual evidence *and* the opposing party could have cross-examined the expert on the point but chose for tactical reasons not to do so. There may be exceptional cases such as an obvious mistake on the face of the expert's report (see *Woolley v Kent CC* [2006] EWCA Civ 753 for a useful example), where no conflicting evidence or cross-examination is necessary, but this case is not exceptional in any sense.
95. Much reliance was placed by the Defendants on the passage in the judgment of the Supreme Court in *Kennedy v Cordia (Services) LLP* [2016] 1 WLR 597, in which Lords Reed and Hodge introduced the phrase "a bare *ipse dixit*" (used by Lord President Cooper in *Davie v Magistrates of Edinburgh* [1953] SC 34) into English law and held that a mere assertion or an unsubstantiated *ipse dixit* by an expert is worthless; though it is important to note that the Supreme Court went on to approve a dictum of Wessels JA in a South African case that an expert's bald statement of his opinion is not of any real assistance "*except possibly where it is not controverted*" [emphasis added]. *Kennedy v Cordia* was a case in which the admissibility of expert evidence on behalf of the pursuer was disputed. The Lord Ordinary allowed it to be admitted, the expert was then cross-examined; and judgment was given for the pursuer. The Inner House held that the evidence should not have been admitted, but the Supreme Court restored the decision of the trial judge. The case provides no support at all for the proposition that a defendant can seek to dismantle the reasoning of an expert for the first time in closing submissions without having applied to cross-examine the expert.
96. Mr Stevens QC submitted that Judge Truman did not find that the Professor's opinion was *wrong*, only that she could not agree with him that causation was proved. This, as I see it, is hair-splitting. If the distinction is a valid one it suggests that there is a special rule applying to opinions on causation as opposed to those on any topic, and I do not consider that there is or that there should be such a distinction.

97. I am not greatly impressed by the importance attached to Professor Pennington’s failure to give a meaningful answer to question 4 of the Part 35 questions. This noted that the witness had offered his opinion that the Claimant suffered gastric illness caused by consumption of contaminated food or fluid from the hotel, and asked to what extent there would be “a range of opinion on causation among appropriate experts”; if so, what the range would be and what his position would be within it, and what acts he had relied on in adopting his position within that range. PD 35 paragraph 3.2(6) does indeed provide that “where there is a range of opinion on the matters dealt with in the report” the expert must summarise the range of opinions and give reasons for his own. But this seems to me to apply more readily to general propositions rather than to the question of whether, taking all the facts of this case into account, causation was proved on the balance of probabilities. In any event, I do not consider that this ground of appeal adds anything of significance to the more important Ground 1.
98. Mr Griffiths must be wondering what he did wrong. He instructed a leading firm of personal injury solicitors, who in turn instructed an eminent microbiologist whose integrity has not been questioned. Mr Griffiths and his wife gave evidence at the trial, were cross-examined, and were found by the judge to be entirely honest witnesses. The eminent expert gave his opinion that on the balance of probabilities Mr Griffiths’ illness was caused by the consumption of contaminated food or fluid supplied by the hotel. No contrary evidence was disclosed or called, and the expert was not cross-examined. Yet the Claimant lost his case.
99. Asplin LJ, with whom Nugee LJ agrees, says at [65] that “as long as the expert’s veracity is not challenged, a party may reserve its criticisms of a report until closing submissions if it chooses to do so”, and that she can see nothing which is inherently unfair in that procedure. With respect, I profoundly disagree. In my view Mr Griffiths did not have a fair trial of his claim. The courts should not allow litigation by ambush. I would therefore have dismissed TUI’s appeal.

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## Order

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UPON hearing Howard Stevens QC, Sebastian Clegg and Dan Saxby for the Appellant and Robert Weir QC and Stephen Cottrell for the Respondent on 27 July 2021

AND UPON judgment having been handed down on 7 October 2021

AND UPON the Respondent applying for permission to appeal to the Supreme Court

IT IS ORDERED THAT: -

1. The Appeal is allowed.

2. The Order of Martin Spencer J dated 17 September 2020 is set aside and the order of HHJ Truman of 4 September 2019 is restored.
3. The Respondent do pay the Appellant's costs of the appeals, such costs not to be assessed or enforced without the permission of the Court pursuant to CPR 44.14.
4. The Respondent's application for permission to appeal to the Supreme Court is refused.